Supreme Court, U.S.
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No. 94-780

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Ohio Senator Richard T. Finan,
Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, INC. IN SUPPORT OF PETITIONERS

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The Freedom From Religion Foundation, Inc. hereby submits this amicus curiae brief in support of the Petitioner and suggests reversal of the decision below.

I. INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation, Inc. (hereinafter "Foundation") is a nonprofit corporation organized and existing under the laws of the State of Wisconsin whose mission is to promote the constitutional principle of separation of church and state. The Foundation has approximately 3,500 members nationwide. Membership is open to both religious and non-religious individuals.

The Foundation believes that the religious should be free to practice the religion of their choice and that the non-religious have a right to be free from religion. The Foundation supports the principle of government neutrality on religious matters. It is concerned that the trend to accommodate religion is undercutting this neutrality and that the instant case is, in part, the result of too liberal a policy of accommodation.

II. SUMMARY OF ARGUMENT

The erection of religious monuments on public property, even a public forum, contravenes the Establishment Clause because it forces government to promote religion. When faced with the necessity of choosing between the Establishment Clause, on the one hand, and the Free Speech, Free Exercise Clauses, on the other, the Establishment Clause must prevail. The application of this principle means that public property should not be used for exhibiting religious displays.

If, however, the Court is unwilling to adopt this position, it should, at a minimum, restrict the public forum doctrine to live demonstrations. The Court should not require that public property be used for unattended displays whether such displays be religious or otherwise. That is a decision that should rest with local government.

III. ARGUMENT

In recent years, the Court has significantly expanded the "equal access" doctrine. This principle, long applicable to speech, has been broadened to include religious speech and activity. In effect, the Court has equated the "free exercise" clause with "free speech".

The Foundation submits that the two clauses should have separate and distinct application. The "free speech" clause should not be interpreted to embrace religious speech because, to do so, forces the state to promote religion. There is a fundamental difference between religious freedom and freedom of speech. Religious speech is tempered by the Establishment Clause which is absolute in its command that the state shall not promote or endorse religion. The speech Clause is not subject to this condition. Allowing the speech clause to apply to religious and non-religious speech alike not only renders the religion clause moot, it places the Court in the present dilemma of having to deal with speech, generally, when only religious speech is at issue.

Application of the equal access doctrine to religious speech is exacerbated by the conflict between those who are religious and those who are not. This conflict is so intense that it brings into question the viability of equal access whenever the speech is that of the non-religious minority. This concern is based on real life situations experienced by the Foundation.

In early December of 1992, Christian displays were set up in a public forum in Ottawa, Illinois. The Foundation decided to put up a counter-display in the form of a canvas banner which stated "Jesus Christ is a Myth". The banner was torn down on the first night by a Sunday school teacher. The banner was again put up the next day and was found burned the following morning. A new banner was made, sprayed with fire retardant, and erected with cables which held it twenty or so feet above the ground. Whereupon, an enterprising citizen sprayed the banner with paint so as to obliterate its message.

The next year, Christmas season of 1993, the Foundation erected a new banner. It was cut down overnight, rehung, and cut down again a day later. The Foundation decided to abandon its effort. As a result, the only messages in the park were those advancing and promoting religion. In fact, members of the Foundation have heard the park referred to by the public as "Christian Park".

This experience suggests that the "public forum" doctrine applies in name only and has no real life value to those who wish to display non-religious messages. It has the unintended result of only promoting the message of the religious majority. It is for this reason that the Foundation submits that this Court should modify the public forum doctrine by ruling that it does not apply to speech or other activities which promote religion.

If, however, the Court declines to adopt this position, the Foundation submits that it should at the very least limit the public forum doctrine to live demonstrations. Public property should not be forced to become a repository for unattended displays whether they be religious or otherwise. The public has a right to enjoy its property free from any number of homemade billboards that might be erected by those who have a message to convey. If reasonable controls are not placed on the public forum doctrine, one can visualize, for example, the Vietnam Memorial becoming littered with all sorts of displays destroying the reverential nature of that Memorial. Such a result would be tragic.

IV. CONCLUSION

WHEREFORE, it is suggested that this Court should reverse the decision of the Court below.

Respectfully submitted,

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